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No. 93-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA REILLY,

Petitioner,

vs.

ABBEY & ELLIS, ET AL.,
TUCSON ELECTRIC POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT TUCSON ELECTRIC POWER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Tucson Electric Power Company ("TEP" or the "Company")[1] submits this brief in opposition to the petition for a writ of certiorari.[2]

[1] Respondent Tucson Electric Power Company represents that it has no parent company, and its subsidiaries are all wholly-owned. *See* U.S. Sup. Ct. Rule 24.1, 28 U.S.C. (Supp. 1994).

[2] The parties to this proceeding in the United States Court of Appeals for the Ninth Circuit were John V. Torrisi, plaintiff-appellee; James Lazar and Patricia Reilly, objector-appellants; and Tucson Electric Power Company, Thomas C. Weir, Sam G. Minter, Joseph B. Wilcox, Kenneth L. Saul, and J. Luther Davis, defendants-appellees. *See* U.S. Sup. Ct. Rule 24.1, 28 U.S.C. (Supp. 1994).

(Footnote continued)

STATEMENT OF JURISDICTION

Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

COUNTER-STATEMENT OF THE CASE

A. Proceedings in the Courts Below

Petitioner Reilly's statement of the case contains numerous factual errors, improper inferences, and references to testimony and figures never presented to the courts below. Pursuant to Rule 15.1 of the Rules of this Court, TEP presents this counter-statement of the case based on the undisputed facts in the record.

This case arose from sixteen shareholder class actions and derivative suits filed against Tucson Electric Power Company and certain of its former officers and directors in the District Court for the District of Arizona and in the Arizona state courts. In November 1989, the federal class and derivative cases were consolidated, and were closely coordinated for pre-trial purposes with the state court class and derivative cases. The class action plaintiffs complained essentially that they purchased the Company's stock at artificially inflated levels over a long period as a result of defendants' misrepresentations about the Company's financial condition and prospects. The class and derivative plaintiffs also claimed that several of the Company's officers and directors engaged in misconduct that injured the Company and its stockholders.

More than two years after the initial action was commenced, and while defendants' motion for summary judgment in the federal class actions was pending, the parties agreed to a proposed $30 million settlement of all the class actions and derivative suits. Notice of the proposed settlement was given by publication and mailing to an estimated 113,000 class members

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Although Patricia Reilly's petition to this Court lists as parties Abbey & Ellis and numerous other law firms for the plaintiffs-appellees, those law firms were *not* parties to the proceedings below.

and current TEP stockholders, and a full hearing was held by the federal district court on February 20, 1992 to consider both the settlement and the request by plaintiffs' counsel for attorneys' fees. Only twenty class members filed written comments or objections, and several of those objectors (including Petitioner Reilly) participated at the hearing. (Reilly App. 6a - 7a, 9a.)[3]

After reviewing the written objections and hearing oral argument, the district court entered a final judgment and order on February 21, 1992 that approved the $30 million settlement and dismissed the federal class actions and derivative suit against all defendants with prejudice.[4] By order entered February 24, 1992, the district court awarded $7.5 million in attorneys' fees to plaintiffs' counsel for creating the $30 million settlement fund.[5] (Reilly App. 7a, 14a - 15a, 21a - 29a.)

Two of the shareholder objectors — James Lazar and Petitioner Reilly — appealed from the judgment and orders of the district court. Both objectors challenged, among other things, the adequacy of the notice of the settlement. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding *inter alia* that adequate notice of the content of the proposed settlement had been given to the class. The court referred to the two objectors as "spoilers" whose "concerns could have been addressed in their individual lawsuits if they had elected to opt out of the settlement." (Reilly App. 5a - 20a.)

B. The Significance of TEP's Precarious Financial Condition

Tucson Electric Power Company is a public utility providing electricity to the city of Tucson, Arizona and surrounding areas.

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[3] References to the Appendix to the Petition of Patricia Reilly are cited in this brief as "Reilly App. __."

[4] The settlement of the state class action and derivative suits was also approved by the Arizona state court. No appeal was taken from that approval.

[5] By Order entered March 25, 1992, the district court denied the request of plaintiffs' counsel for the interest accruing on the portion of the settlement fund awarded to them. (Reilly App. 28a - 29a.)

In 1989, TEP began experiencing serious, widely-reported financial problems. Those problems became so severe that, by early 1991, the Company declared a moratorium on its debt payments and certain other financial obligations, and commenced negotiations to restructure its finances. Those negotiations involved its creditors, lease participants, and major suppliers — all of whom had claims far superior to those of plaintiffs — as well as its regulators at the Arizona Corporation Commission ("ACC") and the Federal Energy Regulatory Commission ("FERC"). Settlement of this litigation became a significant part of that restructuring effort. (Reilly App. 12a.)

In October 1991, after an involuntary petition in bankruptcy had been filed against TEP, the plaintiffs agreed in principle to resolve this litigation subject to court approval. The ACC then approved new electric rates for the Company, expressly conditioned on the Company's restructuring its obligations outside of Chapter 11 and withdrawal or dismissal of the involuntary bankruptcy petition by December 31. Restructuring of TEP's debt was completed shortly thereafter, when the Company's creditors agreed to substantially compromise their claims and to receive approximately 50% of the Company's common stock on a fully diluted basis after the restructuring. Ultimately, this complicated restructuring transaction was approved by the Company's existing preferred and common stockholders, as well as the ACC, the FERC, and the bankruptcy court. (Reilly App. 12a.)

Settlement of these lawsuits was closely related to that restructuring. If settlement had not occurred, the restructuring could have fallen apart, and TEP could have been forced into bankruptcy, which would have jeopardized the opportunity for TEP shareholders to recover anything on their claims. (Reilly App. 12a.)

C. The Adequacy of the Contents of the Notice

To obtain approval of the settlement, the Company sent detailed notices to an estimated 113,000 of its former and current shareholders, and also published notice in the *Wall Street Journal*

and *The New York Times*. The notice sent directly to the class shareholders described the litigation and the class, and explained the decision of plaintiffs' counsel to settle the case based on TEP's financial condition, the risk and expense of further litigation, and the defenses raised by TEP. As part of that explanation, the notice stated "counsel for class plaintiffs believe that the Settlement of the Class Actions described in this Notice confers substantial benefits to the Settlement Class and each of its members, without the additional cost, uncertainty, and delay that would result if the Class Actions were to proceed against the class defendants through trial and appeal." (Reilly App. 7a, 8a, 17a, 32a.)

The notice to the class went on to summarize the terms of the settlement, including the $30 million aggregate fund and the formula for allocating the fund among the various shareholders. The notice further advised of the shareholders' right to "opt out" of the class, the court hearing on the settlement and the application for attorneys fees, and the opportunity to review more detailed papers and to speak with plaintiffs' counsel. (Reilly App. 7a, 8a, 17a.)

REASONS FOR DENYING THE WRIT

I. PETITIONER REILLY HAS NOT STATED ADEQUATE REASONS FOR GRANTING HER PETITION.

Petitioner Reilly does not dispute that the settlement of this case for $30 million was fair, adequate and reasonable under the circumstances, particularly given TEP's precarious financial condition. Reilly also does not dispute that she and the class had full notice of the terms of the aggregate $30 million settlement and the formula for allocating that aggregate amount among shareholders. Finally, Reilly readily concedes that she and the class had full opportunity to investigate the settlement's terms, to attend the court hearing and object to those terms, or to "opt out" of the class if the terms were inadequate.

Reilly's only argument in her petition is that the class was deprived of due process because the notice did not advise shareholders of the specific amount they would each receive from

the aggregate settlement, and that shareholders were misled into thinking that they would each recover a "substantial" percentage of their total losses.

This claim does not state a legitimate reason for granting Reilly's petition for certiorari, because it neither identifies a conflict among the circuits, nor does it raise a novel question of law. *See* U.S. Sup. Ct. Rule 10, 28 U.S.C. (Supp. 1994). This Court has already determined that notice of a class action meets due process requirements if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974). The lower courts have uniformly interpreted this standard to be met in class action settlements if the notice includes the general parameters of the settlement and permits class members an opportunity to investigate and be heard, even if it does not include details with respect to each individual class member's recovery. *See, e.g., Great Northern Packaging v. Pleasure Homes, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. 1981) (notice of settlement was satisfactory even though it failed to provide an estimated range of recovery per unit); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977) (aggregate amount of proposed settlement and formula for computing recoveries was all that due process required); *Bennett v. Behring Corp.*, 96 F.R.D. 343 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984) (notice only required to advise class members of general parameters of settlement, not the details).

As the Ninth Circuit held, the notice in this case fully met this well-established standard (Reilly App. at 8a - 9a), and Petitioner has not identified any case law supporting her theory that this well-established standard does not comply with due process.

II. THE CLASS NOTICE WAS ADEQUATE AND FULLY DISCLOSED ALL AVAILABLE INFORMATION.

Even if Reilly had presented a proper issue for certiorari, her petition would still fail on the merits.

Reilly argues that the notice misled shareholders by suggesting that they would each receive a "substantial" portion of their "losses." This is incorrect. The notice simply states that, in the opinion of plaintiffs' counsel, a $30 million settlement offers substantial benefits to the class and its members under the circumstances here, which involved a company on the verge of bankruptcy and shareholder claims that were subject to a motion for summary judgment by defendants. The notice does not attempt to compare the $30 million settlement with the total losses allegedly caused by TEP's misconduct, nor does it suggest in any way that when the $30 million was allocated it would provide shareholders with a substantial portion of the losses they each allegedly suffered as a result of TEP's misconduct.

Reilly also contends that the notice should have advised shareholders exactly what percentage of their total losses they would receive from the aggregate settlement. But such notice was not only impossible but also unnecessary for several reasons.

First, there was considerable dispute during the litigation over the total losses recoverable by the class. (TEP's motion for summary judgment argued, among other things, that market forces – not TEP's alleged misconduct – caused the substantial percentage of the drop in the stock price complained of by TEP shareholders.) That issue was not resolved by the settlement, which was based more on TEP's precarious financial condition than any firm estimate of total recoverable losses, and thus it would have been misleading to TEP's shareholders for plaintiffs' counsel to speculate in the notice on those losses. Although one of plaintiffs' counsel apparently told Reilly, in response to her question, that plaintiffs could have claimed total losses ranging between $200,000,000 and $400,000,000 had this case gone to trial, those figures were not based upon any damage study prepared during the litigation, and they apparently assumed that plaintiffs could recover for the total drop in TEP's

stock price over an extended period, which TEP vigorously disputed and was prepared to rebut.

Second, the notice could not possibly identify the amount or percentage of each individual shareholder's recovery, because that would depend on the individual circumstances of each shareholder, which was unknowable until they submitted proofs of claim after the settlement was approved.[6] More significantly, the amount each shareholder receives will depend upon the number of shareholders who submit a "proof of claim," because an individual's proportionate share of the aggregate amount could vary dramatically if a large number of shareholders either "opted out" of the class or declined to submit proofs of claim. (Reilly App. 7a.) Although Petitioner claims that it is common knowledge that settlements in these types of cases only result in shareholders recovering 5% to 10% of their total losses, citing information that was not in the record below, that generalization would not necessarily apply here, and it would have been misleading to report that range of recovery without some firm basis.

Third, and perhaps most fundamentally, Reilly's own experience in this case demonstrates conclusively how the notice was fully adequate, and how further information was unnecessary. Based on the notice, Reilly had the opportunity to investigate on the issue of what her individual recovery would be, and she took advantage of that opportunity. Based on what she learned, Reilly also had the opportunity to object to the settlement in open court, or to opt out if she so desired. Due process requires no more. *See Mullane v. Central Hanover Bank & Trust*, *supra*, 339 U.S. at 314.

Petitioner further speculates that if the class notice had contained additional information, shareholders in this case might have disapproved the settlement, and "required that the defrauding officers and directors be actually held accountable."

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[6] Each individual shareholder's losses would depend on a variety of factors, including the price they paid for the stock, the amount they sold it for (if they sold), and their ability to supply valid evidence of their purchase.

(Reilly Pet. at 21.) However, the facts show that the settlement of this case was reached after defendants had moved for summary judgment that would have absolved them of all liability, and was intertwined with a much broader restructuring of TEP's finances that was designed to avoid bankruptcy for TEP. If the shareholders had disapproved the settlement simply to pursue claims against the individual officers and directors, they would have lost the opportunity to access the $30 million settlement, and would have been left with nothing if the summary judgment motion was granted or if their action had upset the restructuring and thrown TEP into bankruptcy. *See* 11 U.S.C. § 510(b). Faced with that choice, shareholders clearly had no incentive to disapprove the settlement.

Finally, Petitioner Reilly's suggestion that officers and directors "pay nothing" in this case is incorrect. The $30 million settlement was funded by the officers' and directors' insurance policy, which of course is specifically designed to indemnify them for exactly the sort of misconduct alleged in this case. Although Petitioner Reilly may wish that the officers and directors were held more accountable, vengeance is not a valid reason to deprive the entire class of a reasonable settlement and to expose the class to the risk they would receive nothing.

CONCLUSION

For all the foregoing reasons, Petitioner Reilly's petition for a writ of certiorari should be denied.

Respectfully submitted,

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